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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PRISCILLA BELLAND *et al.*,
Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Pension Benefit Guaranty Corporation may utilize the statutory "other reasonable basis" test for purposes of denying 29 U.S.C. §1461(b) retroactive plan termination insurance coverage to a pension plan which satisfied the first statutory "ceased to accrue" test by accruing benefits subsequent to June 30, 1974.

II. Whether in applying the "other reasonable basis" test the Pension Benefit Guaranty Corporation's use of criteria which led to a denial of plan termination insurance coverage based on the theory of "insubstantial participation" was consistent with the purposes of 29 U.S.C. §1461(b).

PARTIES BELOW

This case was certified as a class action by United States District Court Judge Norma Holloway Johnson. The other named Plaintiffs representing the class are Elaine Coppock, Peter Marcinski, Phillip Schlaack, and Catherine Vegh. Besides the Pension Benefit Guaranty Corporation the other defendants in the proceedings below were Georgia-Pacific Corporation, Brown Company and the United Paperworkers International Union. The instant Petition is directed only to the Pension Benefit Guaranty Corporation.

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PETITION FOR A WRIT OF CERTIORARI ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on February 3, 1984. A timely Petition for Rehearing was denied on April 2, 1984. Appendix at 46a. The jurisdiction of the Courts below was based upon 28 U.S.C. §1331 and 29 U.S.C. §1302(b). This Court's jurisdiction is envoked pursuant to 28 U.S.C. §1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, 726 F.2d 839 (D.C. Circuit 1984), appears in the Appendix[1] to the Petition for

[1]All references herein to Petitioners' Appendix to their Petition for a Writ of Certiorari are designated "Appendix at (*page no.*).

Certiorari at page 1a. The opinion of the United States District Court for the District of Columbia, granting Summary Judgment in favor of the Pension Benefit Guaranty Corporation, which was affirmed by the Court of Appeals, was not reported and is printed in the Appendix at page 26a.

STATUTE INVOLVED

29 U.S.C. §1461(b) is found at page 47a of the Appendix.

STATEMENT OF THE CASE

Two Hundred Fifty-Three (253) people, many of whom had worked in the same factory for several decades, had their monthly pensions reduced by over 75% from $6.00 to a $1.50 per month for each year of service, when their employer closed the factory. Because the pension plan was underfunded the trustees of the plan reduced the benefits by 75% effective April 1, 1975.

Georgia-Pacific Corporation, employer and owner of the factory known as Plant 11, discontinued manufacturing operations there for economic reasons on or about June 30, 1974. On July 1, 2, and 3, 1974 two (2) Plant 11 employees worked full shifts, plus overtime in their usual capacity as forklift operators. They received wage and accrued pension benefits in the Georgia-Pacific Midwestern Joint Pension Trust (Georgia-Pacific Pension Plan). Subsequent to June 30, 1974, pension benefits were also accrued by twelve (12) employees who received vacation pay after July 1, 1974 for vacation time earned before that date; by twelve (12) employees who received holiday pay for July 4, 1974; and by nine (9) employees who received "shortage pay" subsequent to June 30, 1974 for erroneously unpaid wages earned prior to July 1, 1974.

The Plant 11 employees' union, United Paperworkers International Union ("UPIU") made a timely application on behalf of the employees to the Pension Benefit Guaranty Corporation ("PBGC") for plan termination insurance under the "window period" created by 29 U.S.C. § 1461(b) of the Employee Retirement Income Security Act ("ERISA"). This subsection provides retroactive insurance coverage for pension plans which terminated between July 1 and September 1, 1974.

The administrative remedy process was exhausted in October 1977 when the PBGC completed its final review and reaffirmed its earlier decision denying coverage (Appendix at 36a, 38a, 40a and 43a).

The PBGC determined that the Georgia-Pacific Pension Plan terminated prior to July 1, 1974 and, accordingly, was not eligible for "window period" coverage. 29 U.S.C. § 1461(b) provides that the PBGC will determine a plan's termination date for purposes of "window period" coverage "on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection." The PBGC chose to disregard the first test based on the date benefits "ceased to accrue". Instead, it utilized the "other reasonable basis" test to find a pre-"window period" termination and deny coverage.

Having decided to use the "other reasonable basis" test, the primary factors the PBCD considered in determining that the plan terminated prior to July 1, 1974 were the number of employees who accrued benefits during the "window period", the number of employees who actually worked past June 30, 1974, the type of work performed for which benefits accrued, and the accrual of holiday and vacation pension benefits. The PBGC concluded that the pension plan terminated prior to the "window period"

because of the "insubstantial" participation by the employees in the plan after June 30, 1974.

On May 7, 1979, Petitioners filed a class action against four (4) defendants which included a claim against the PBGC seeking injunctive relief directing the PBGC to pay those past, present and future "window period" plan termination insurance benefits pursuant to 29 U.S.C. § 1461(b). Petitioners moved for Summary Judgment. The Honorable Norma Holloway Johnson, United States District Judge for the District of Columbia, granted the PBGC's Motion for Summary Judgment on June 30, 1981.

The other three (3) defendants filed Motions for Summary Judgment which Judge Johnson granted on December 30, 1982. Petitioners moved to dismiss with prejudice their action against defendant UPIU which was granted on March 18, 1983.

An appeal was taken from the Trial Court's Order Granting Summary Judgment to the PBGC, Georgia-Pacific Corporation and Brown Company to the United States Court of Appeals for the District of Columbia Circuit which affirmed the District Court in a 2 to 1 decision with the Honorable Patricia M. Wald dissenting in part. The majority opinion was filed by the Honorable Edward A. Tamm who was joined by the Honorable Kenneth A. Starr. The instant Petition for Writ of Certiorari goes only to those portions of the Court of Appeals judgment dealing with the PBGC.

REASONS FOR GRANTING THE WRIT

I. The Pension Benefit Guaranty Corporation abused its discretion in determining the termination date of a pension plan for purposes of retroactive ERISA plan termination insurance coverage to be prior to the qualifying "window period" created by 29 U.S.C. § 1461(b), where it disregarded the statute "date on which benefits ceased to accrue" test which the plan satisfied in favor of the "other reasonable basis test" in order to deny coverage.

The PBGC abused its discretion in determining the termination date of a pension plan for purposes of retroactive ERISA plan termination insurance coverage to be prior to the qualifying window period created by 29 U.S.C. § 1461(b), where it disregarded the statutory "date on which benefits ceased to accrue" test which the plan satisfied in favor of the "other reasonable basis" test in order to deny coverage.

The actual criteria used by the PBGC in its application of the "other reasonable basis" test were inconsistent with the purposes of 29 U.S.C. § 1461(b).

The majority of the three judge panel from the United States Court of Appeals for the District of Columbia Circuit in a case of first impression has decided an important question of federal law which deals with the "window period" grant of retroactive plan termination insurance created by 29 U.S.C. § 1461(b) of the remedial legislation known as the Employee Retirement Income Security Act of 1974 U.S.C. § 1001 et seq. The Court of Appeals interpretation has allowed the Pension Benefit Guaranty Corporation ("PBGC") to thwart the clear and specific Con-

gressional intent behind 29 U.S.C. § 1461(b) by its restrictive application of that provision in the instant case. *Belland* v. *PBGC*, 726 F.2d 839 (D.C. Cir. 1984). Prior to this case, the question of the proper interpretation of 29 U.S.C. § 1461(b) has never been before this Court.

Title IV of ERISA, 29 U.S.C. § 1301 et seq. provides a comprehensive insurance program for pension plans which fail in order to protect workers who would otherwise be deprived of their earned retirement benefits. Throughout the development of the ERISA legislation and the debate over its passage a variety of possible effective dates for plan termination were proposed. Ultimately, although ERISA was not enacted until September 2, 1974, Congress created a special "window period" from July 1 through September 1, 1974 in 29 U.S.C. § 1461(b). This section provided retroactive plan termination insurance coverage for qualified single employer pension plans which terminated during the "window period".

29 U.S.C. § 1461(b) provided that the plan's termination date would be determined by the PBGC,

> on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.

This Court has previously recognized the preeminent remedial nature of ERISA and its plan termination insurance provisions. This Court stated,

> One of Congress' central purposes in enacting this complex legislation was to prevent 'the great personal tragedy suffered by employees whose vested benefits are not paid when pension plans are terminated' . . . Congress wanted to correct that condition [deprivation of promised pension benefits] by making sure that if a worker has

> been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — that he actually receive it. *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980) (footnote omitted).

The legislative history behind ERISA[1] rings out with Congress' concern for pensioners whose pension benefits were reduced or eliminated and its intent to remedy the situation. A typical example of this concern is Representative Perkins statement,

> Too many people pay money into private pension plans year after year expecting eventually to receive retirement income, and they end up getting nothing.
>
> And that Mr. Chairman, is what this bill is all about. It is unfair and inequitable, and almost invariably, tragic as well, for workers to defer income from wages or salary in anticipation of retirement benefits which they will never get. 2 Legislative History at 3367.

As Judge Wald in her dissent below noted in regard to the case at bar, the legislative history is,

> ". . . replete with tragic stories like before us. See, e.g. 3 Legislative History at 4665 (Statement of Rep. Thompson); *id.* at 4695 (remarks of Rep. Brademas); *id.* at 4712-13 (remarks of Rep. Ford); *id.* at 4716-17 (remarks of Rep. Daniels); *id.* at 4749-50 (remarks of Sen. Javits); *id.* at

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[1]The ERISA legislative history has been reprinted in a three volume compilation entitled Subcommittee on Labor of the Committee on Labor and Public Welfare United States Senate, 94th Cong., 2nd Sess., *Legislative History of the Employee Retirement Income Security Act of 1974 (1976)*, hereinafter cited as (Vol) Legislative at (*page*).

4792-94 (remarks of Sen. Bentsen). *Belland*, 726 F.2d at 848, fn. 1.

Congress' specific intent in creating the "window period" retroactive insurance is also clear. Senator Javits stated in explaining the Conference Report,

> Probably one of the most difficult problems confronted by the conferees was the selection of effective dates for the insurance program, and here both Senate and House conferees worked diligently to arrange a structure of effective dates that *would bring the insurance protection generally into effect as quickly as possible.* This was done in recognition of the fact . . . that a number of plans were in critical straits and were terminating or were likely to do so imminently. (Emphasis added). 3 Legislative History at 4766.

Similarly, Representative Ullman, Senator Williams, who was the Chairman of the Conference Committee, and Senator Long each described the purpose of the "window period" in identical terms:

> *In order to provide prompt and effective protection* for the employees concerned, insurance coverage for plans established by single employers becomes effective for plans terminated after June 30, 1974. (Emphasis added). 3 Legislative History at 4678, 4742, 4781 respectively.

As Judge Wald noted in her dissent,

One member of the conference committee which drafted the 'window period' provision, explained that it would extend coverage to a plan much like that of these appellants. Representative Thompson thus recommended the bill to his colleagues in part as follows:

> In my own district, the Roebling plant of the Colorado Fuel and Iron Co. was closed June 30 thereby thrusting almost 1,400 men and women into the ranks of the unemployed. Many of these employees had 30 to 35 years of service in the plant . . . Although the plant ceased operation June 30, the pension plan for those employees continues in existence. The conference substitute covers all pension plant [sic] terminations of single employer plans occurring after July 1, 1974. Inasmuch as the Roebling pension plan was not terminated prior to July 1, 1974, within the meaning of the term as used in the conference report, the plants and its employees are covered [by section 1461(b)]. 3 Legislative History at 4665.

Congress thus appears to have contemplated coverage under section 1461(b) of a plan for a plant in which *no* employees worked during the window period. (Emphasis supplied). *Belland*, 726 F.2d. at 849.

The Legislative History and the very creation of the "window period" is overwhelming evidence of the remedial and expansive nature of this legislation. The PBGC which was afforded ". . . emergency authority to institute insurance protection on a 'crash basis' "[2] has flaunted the Congressional intent behind ERISA as a whole and 29 U.S.C. § 1461(b) specifically, by its limiting interpretation and application of this subsection.

Under the "ceased to accrue" test The Georgia-Pacific pension Plan terminated after June 30, 1974 because the plan had a variety of benefit accruals after that date. As noted above in the Statement of the Case, these accruals came from work performed after June 30, 1974, vacation

[2]3 Legislative History at 4766 (remarks of Senator Javits).

and holiday time and shortage pay. Having accrued benefits past June 30, 1974 the plan was still in operation and the termination occurred later during the "window period". Accordingly, the plan was entitled to plan termination insurance.

The PBGC flaunted Congress' intent behind ERISA and the "window period" by using the "other reasonable basis" test over the "ceased to accrue" test when the plan clearly qualified for coverage under the primary, palpable and objective "ceased to accrue" test.

Despite the remedial and expansive nature of ERISA and the "window period", the majority below interpreted 29 U.S.C. §1461(b) to give the PBGC complete discretion to use the "other reasonable basis" test over the "ceased to accrue" test so long as it is consistent with the purpose of subsection 1461(b). The majority held the PBGC's use of the "other reasonable basis" test was "consistent with maintaining insurance premium rates at the lowest practicable level," *Belland*, 726 F.2d at 843.

In this regard, the majority's interpretation of 29 U.S.C. § 1461(b) upholding the PBGC's decision to ignore the "ceased to accrue" test which the plan had satisfied does violence to ERISA itself. In the instant case it is uncontested that the PBGC could have granted plan termination insurance by applying the "ceased to accrue" test which the plan had satisfied. *Belland*, 726 F.2d at 850. Nevertheless, in spite of the clear Congressional intent behind the creation of the "window period", the majority had determined it is permissible for the PBGC to administer the "window period" in such a narrow and stingy fashion because it is consistent with the economic purpose of maintaining low insurance premium rates.

Petitioner does not question Congress' intent that the plan termination insurance became self-financing and that

the premiums not rise so high as to discourage employers from creating and continuing pension plans. *Belland*, 726 F.2d at 843. However, the Congress' fundamental, preeminent and immediate concern was to help pensioners. The Conference Committee specifically rejected the proposal to delay insurance coverage three (3) years to build up cash reserve. Rather, it did the exact opposite by instituting a "crash" program through the "window period" and providing insurance coverage for terminated plans two (2) months before ERISA was even signed into law. 3 Legislative History at 4647-4648. (Joint Explanatory Statement of the Committee of the Conference). The majority's reliance on the "low insurance premiums" purpose over the remedial purpose of expanding plan termination coverage strikes at the very heart of ERISA and the "window period".

The majority recognized that ERISA is a remedial statute and that remedial statutes are to be liberally construed to effectuate their purpose. See *International Union, UAW* v. *Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978), *Belland*, 76 F.2d at 844. While emphasizing the importance of the plain meaning rule in interpreting the statute, the majority, nevertheless, recognized that, "Application of the plain meaning rule does not preclude consideration of persuasive legislative history. Citing, *March* v. *United States*, 506 F.2d 106, 1313-14 fn. 29 (D.C. Cir. 1974)", *Belland*, 726 F.2dd at 844 fn. 6.

Petitioners' interpretation of 29 U.S.C. § 1461(b) emphasizes its remedial and expansive nature. The statute grants the PBGC the discretion to go from the "ceased to accrue" test to the "other reasonable basis" test in order to *expand* coverage to those plans which would not qualify under the "ceased to accrue" test.

Petitioners' interpretation is consistent with the statutory language, the legislative history and ". . . the cardinal

principle of statutory construction [which is] to save and not destroy . . . [and] to give effect, if possible, to every clause and word of a statute," *United States* v. *Menasch,* 348 U.S. 528, 538, 539. Petitioners' interpretation gives life to every clause in the statute and is totally consistent with the true remedial and expansive purpose behind ERISA and the "window period". This interpretation also meshes with the example given by Rep. Thompson of the Roebling plant which was cited above. 3 Legislative History at 4665.

On the other hand, the PBGC's interpretation, adopted by the majority below, effectively excises the "ceased to accrue" test from the statute by "rendering it meaningless" as Judge Wald noted in her dissent. *Belland*, 726 F.2d at 850. By according the PBGC such unbridled discretion, the majority decision has gritted the "window period". This decision is inconsistent with the Congressional purpose of the "window period" and mocks ERISA's remedial *raison d'etre*. The decision should be overturned.

II. The actual criteria used by the PBGC in its application of the "other reasonable basis" test were inconsistent with the purposes of 29 U.S.C. § 1461(b).

In balancing the factors it chose under the "other reasonable basis" test, the PBGC again acted inconsistently with the purposes of Congress' creation of the "window period". The majority below upheld the PBGC's turning away from the more palpable and objective "ceased to accrue" test. The PBGC found that the Georgia-Pacific Pension Plan had "effectively" or "substantially" terminated prior to the "window period" by balancing a variety of factors. It has thereby created an added stumbling block never comtemplated by the Congress in the remedial scheme of ERISA and the "window period".

CONCLUSION

In her dissent below, Judge Wald concluded,

> . . . The PBGC has squeezed every last drop of agency discretion it could extract – and some it rightly couldn't – from a few words of a statutory scheme intended to remedy the disastrous consequences of pension plan collapse, and thus drowned the only hope these 250 individuals had of restoring a measure of retirement security. *Belland*, 726 F.2d. at 851.

In upholding the PBGC, the majority below had decided the question of the interpretation of 29 U.S.C. § 1461(b) is a way which flaunts the overwhelming remedial and expansive nature of ERISA and the "window period." In view of the importance of this major piece of legislation, this Court should grant the instant Petition for a Writ of Certiorari and reverse the judgment of Summary Judgment entered below and order that Summary Judgment be entered in favor of Petitioners.

Respectfully submitted,

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1079

PRISCILLA BELLAND, *et al.*, APPELLANTS

v.

PENSION BENEFIT GUARANTY CORPORATION, a Federal body, *et al.*

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 79-1248)

Argued October 28, 1983

Decided February 3, 1984

James R. Treese for appellants.

Eugene B. Granof for appellee Georgia Pacific Corporation.

Paul E. Freehling, with whom *John D. Heckert* was on the brief, for appellee Brown Company.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

James N. Dulcan for appellee Pension Benefit Guaranty Corporation.

Leonard Appel entered an appearance for appellee United Paperworkers International Union.

Before TAMM, WALD, and STARR, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* TAMM.

Opinion dissenting in part filed by *Circuit Judge* WALD.

TAMM, *Circuit Judge*: On May 7, 1979, appellants brought this action in district court seeking to recover certain pension benefits. Appellants alleged that the federal agency, Pension Benefit Guaranty Corporation (PBGC), was arbitrary and capricious in deciding that their pension plan was not eligible for federal insurance coverage under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1461(b)(2) (Supp. V 1981). They also alleged that their former employers, Brown Company (Brown) and Georgia-Pacific Corporation (Georgia-Pacific), breached contractual promises by reducing appellants' pension benefits.

United States District Judge Norma Holloway Johnson entered judgments in favor of PBGC, Brown, and Georgia-Pacific. *Belland v. PBGC*, No. 79-1248 (D.D.C. June 30, 1981 & Dec. 30, 1982). Appellants challenge those judgments on appeal. For reasons expressed herein, we affirm.

I. BACKGROUND

A. *The Reduction of Pension Benefits*

Appellants comprise about 253 individuals who, until the summer of 1971, were employees of Brown at a paper products manufacturing plant in Portage, Michigan. Joint Appendix (J.A.) at 911. In June 1971, Brown sold the Portage plant to Georgia-Pacific. Appellants remained at the Portage plant and became Georgia-Pacific employees.

While working for Brown, appellants had participated in the Brown Company Pension Plan No. 1 (Brown Pension Plan). Because appellants, upon becoming Georgia-Pacific employees, would no longer accrue benefits under the Brown Pension Plan, the two companies provided for appellants' pensions in the purchase and sale agreement for the Portage plant. In article 7(b)(i) of the agreement, Georgia-Pacific agreed to enter into collective bargaining with appellants' representatives to substitute for the Brown Pension Plan either a new or an existing Georgia-Pacific plan.[1] In article 7(b)(ii), Georgia-Pacific promised to strive during collective bar-

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[1] Article 7(b) of the agreement provided in pertinent part:

b) Hourly Employees:

(i) Buyer [Georgia-Pacific] agrees to enter into collective bargaining with the representatives of the employees of Seller [Brown] in the bargaining unit at Plant 11 [Portage plant] who become employees of Buyer for the purpose of substituting for Brown Company Pension Plan No. 1 either a mutually agreed upon separate plan applicable to said employees or participation by them in the Georgia-Pacific Midwestern Joint Pension Trust.

(ii) It shall be the goal of collective bargaining on the subject of pensions with respect to said employees that they shall receive benefits at retirement comparable to those they would have received had they remained covered by Brown Company Pension Plan No. 1 as it existed on the effective date of transfer of their employment from Seller to Buyer except as changes may be mutually agreed upon between Buyer and the collective bargaining representatives of said employees.

(iii) As soon as reasonably practicable, Seller shall cause the pro rata share of the monies currently in the Trust Fund for Brown Company Pension Plan No. 1 allocable to said employees to be transferred to such plan as may be agreed upon in such collective bargaining for the benefit of said employees.

Joint Appendix (J.A.) at 1209.

gaining to obtain retirement benefits for appellants comparable to benefits provided by the Brown Pension Plan. In article 7(b) (iii), Brown agreed to transfer to Georgia-Pacific appellants' pro rata share of money in the Brown Pension Plan, and Georgia-Pacific agreed to apply this transferred money to appellants' new pension plan.

Georgia-Pacific entered into a collective bargaining agreement with appellants in June 1971. J.A. at 1088-89. The agreement provided that appellants would participate in the Georgia-Pacific Midwestern Joint Pension Trust (Georgia-Pacific Pension Plan), which provided benefits comparable to the Brown Pension Plan.[2] *Id.* at 926 n.*. In February 1972, the parties amended the Georgia-Pacific Pension Plan to make benefit reductions mandatory when fund assets became insufficient.[3]

In March 1974, Georgia-Pacific announced that the Portage plant would be closed by June 30, 1974. J.A. at 593. By June 30, 1974, all production at the plant had ceased, and only two employees remained. *Id.* These

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[2] Whereas the Brown Pension Plan calculated pension benefits on the basis of $5 per month per year of service, the Georgia-Pacific Pension Plan calculated pension benefits on the basis of $6 per month per year of service. J.A. at 912.

[3] The February 1972 amendment mandated uniform benefit reductions:

> If, on any valuation date, it is determined by the actuary that the [Georgia-Pacific Pension Plan] . . . is not funded on an actuarially sound basis, or contributions by an employer allocated to funding its minimum benefits are permanently discontinued while such account is less than fully funded, . . . the minimum benefits thereafter payable to any employee, . . . whether or not theretofore retired, shall forthwith be permanently adjusted to a fraction of the minimum benefit otherwise determined . . . and no further contributions by the employer allocated to funding minimum benefits under said Exhibit shall thereafter be required.

J.A. at 1154-55.

two employees were terminated after completing plant closure between July 1 and July 3, 1974. *Id.* at 33, 593.

With plant closure came the cessation of contributions to the Georgia-Pacific Pension Plan. The pension plan trustees determined that existing pension plan assets would not be sufficient to pay appellants the amount provided by the plan. Accordingly, in compliance with the plan, *supra* note 3, the trustees in March 1975 reduced appellants' pension benefits from six dollars per month per year of service to one dollar and fifty cents per month per year of service. J.A. at 912. Appellants received immediate written notification of the pension benefit reduction. *Id.* at 917.

B. *Appellants Apply to PBGC for Pension Plan Insurance Coverage Under ERISA*

Congress established PBGC on September 2, 1974 to administer the pension plan insurance provisions of ERISA. 29 U.S.C. § 1302 (1976). ERISA provides a comprehensive insurance program for certain pension plans that terminated on or after September 2, 1974. *Id.* § 1461(a). ERISA also provides retroactive insurance coverage for certain pension plans that terminated between July 1 and September 1, 1974. *Id.* § 1461(b). This retroactive coverage period commonly is called the "window period." Congress expressly tasked PBGC with determining whether a plan seeking window period coverage terminated during the window period. *Id.* Congress established two tests for making this determination: PBGC "shall make the determination on the basis of the date on which benefits ceased to accrue [the "ceased to accrue" test] or on any other reasonable basis consistent with the purposes of this subsection [the "other reasonable basis" test]." *Id.*

On September 13, 1974, appellants applied to PBGC for pension plan insurance coverage under the window period provision of ERISA. J.A. at 595. PBGC applied

the "other reasonable basis" test and, based upon the *de minimis* participation by appellants in the plan after June 30, 1974, concluded that the plan terminated before July 1, 1974. Accordingly, in June 1975, PBGC notified appellants that the Georgia-Pacific Pension Plan was not eligible for window period coverage. *Id.*

In December 1975 and June 1976, PBGC reviewed its decision that appellants' pension plan terminated before July 1, 1974. J.A. at 593. Appellants, assisted by their union and by Georgia-Pacific, submitted additional factual materials to PBGC. *Id.* at 55, 65, 68. PBGC nevertheless affirmed its earlier decision. *Id.* at 593. In October 1977, PBGC determined the case should not be reopened. *Id.* at 131.

C. *The District Court Decision*

On May 7, 1979, appellants filed the instant action against PBGC, Brown, and Georgia-Pacific. Appellants alleged that PBGC improperly denied window period pension coverage under ERISA. Appellants argued that PBGC was arbitrary and capricious in its interpretation and application of section 1461(b). J.A. at 593-94. Alternatively, appellants argued that PBGC violated the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1982), because it failed to promulgate rules governing the eligibility of pension plans seeking window period coverage. J.A. at 594. On June 30, 1981, the district court entered summary judgment for PBGC. *Belland v. PBGC*, Civ. No. 79-1248 (D.D.C. June 30, 1981).

In their complaint against Brown and Georgia-Pacific, appellants alleged that both companies breached oral promises that appellants would receive pension benefits of six dollars per month per year of service. J.A. at 914. Appellants also argued that Brown and Georgia-Pacific breached the purchase and sale agreement for the Portage plant by allowing the substantial reduction of pension benefits. *Id.* On December 30, 1982, the district

court entered summary judgment for Brown and Georgia-Pacific. *Belland v. PBGC*, Civ. No. 79-1248 (D.D.C. Dec. 30, 1982).

This appeal followed.

II. Analysis

A. *Appellants' Claims Against PBGC*

1. PBGC's Interpretation of Section 1461(b)

Appellants contend that PBGC's decision to deny insurance coverage based exclusively on its application of the "other reasonable basis" test was arbitrary, capricious, and an abuse of discretion. Appellants stress that the purpose of ERISA is to provide relief for employees who otherwise would lose their pension benefits. In light of the remedial purpose underlying ERISA, appellants argue that section 1461(b) must be construed to provide expansive relief. Appellants therefore contend that section 1461(b) requires PBGC to apply the "ceased to accrue" test and allow window period coverage when, as here, *any* pension benefits accrued during the window period. If no pension benefits accrued during the window period, appellants contend that PBGC still has discretion to extend coverage pursuant to the "other reasonable basis" test. Because PBGC allegedly ignored the "ceased to accrue" test and relied exclusively on the "other reasonable basis" test, appellants argue that PBGC was arbitrary and capricious in its interpretation of section 1461(b).

We are not persuaded by appellants' argument. PBGC's interpretation of ERISA is entitled to great deference. *See United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1296 (3d Cir. 1983); *Concord Control, Inc. v. International Union, UAW*, 647 F.2d 701, 704 (6th Cir.), *cert. denied*, 454 U.S. 1054 (1981); *Connolly v. PBGC*, 581 F.2d 729, 730 (9th Cir. 1978), *cert. denied*, 440 U.S. 935 (1979). We do not rely solely on great deference here, however, because PBGC's interpre-

tation of section 1461(b) was consistent with the plain language of ERISA.

Our starting point for determining whether PBGC properly interpreted section 1461(b) is, of course, the language of the statute itself. *See March v. United States*, 506 F.2d 1306, 1313 & n.26 (D.C. Cir. 1974). If the statutory language "is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion." *Id.* at 1313 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). Section 1461(b) is phrased unambiguously in the disjunctive. PBGC is authorized to determine whether the Georgia-Pacific Pension Plan terminated during the window period "on the basis of the date on which benefits ceased to accrue *or* on any other reasonable basis consistent with the purposes of this subsection." 29 U.S.C. § 1461(b) (emphasis added). The statute clearly accords to PBGC the discretion to use the "other reasonable basis" test so long as the test is consistent with the purposes of section 1461(b).

PBGC's use of the "other reasonable basis" test here was consistent with the purposes of section 1461(b). An obvious purpose of this section is to provide insurance coverage retroactively for eligible pension plans. Another purpose, however, is to promote low insurance premiums.[4] Although Congress was concerned in ERISA with protecting employees' expectations of pension benefits, Congress also realized that employers would neither create nor maintain pension plans if ERISA imposed too much cost. "Consequently, the entire statute is a finely tuned balance between protecting pension benefits for employees while limiting the cost to employers." *A-T-O*,

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[4] ERISA provides in pertinent part: "The purposes of this subchapter, which are to be carried out by [PBGC], are . . . to maintain premiums established by [PBGC] . . . at the lowest level consistent with carrying out its obligations under this subchapter." 29 U.S.C. § 1302(a)(3).

Inc. v. PBGC, 634 F.2d 1013, 1021 (6th Cir. 1980). Because PBGC's use of the "other reasonable basis" test here was consistent with maintaining insurance premium rates at the lowest practicable level, PBGC complied with the plain meaning of section 1461(b).[5]

We are mindful of the principle that remedial statutes are to be liberally construed to effectuate their purpose. *See International Union, UAW v. Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978). That principle, however, "does not give the judiciary license, in interpreting a provision, to disregard entirely the plain meaning of the words used by Congress." *Symons v. Chrysler Corp. Loan Guarantee Board*, 670 F.2d 238, 241 (D.C. Cir. 1981). If Congress had intended that PBGC always use the "ceased to accrue" test in making window period coverage decisions, that intention would be manifest in the statutory language.[6] We find no evidence that section 1461(b) requires PBGC to use the "ceased to accrue" test when deciding the eligibility of pension plans seeking window period coverage. Instead, section 1461(b) gives PBGC discretion to use the "other reasonable basis" test so long as PBGC adheres to the purposes of section 1461(b). Here, PBGC adhered to an express statutory purpose and complied with the statute's plain language.

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[5] Congress intended the pension plan insurance program to become self-financing. A-T-O, Inc. v. PBGC, 634 F.2d 1013, 1021, 1023, 1025 (6th Cir. 1980). Although PBGC is authorized to borrow money from the United States Treasury, 29 U.S.C. § 1305(c), the insurance program ultimately will be financed by premiums paid by covered plans. *Id.* § 1306(a)(1) ("[PBGC] shall prescribe such insurance premium rates . . . as may be necessary to provide sufficient revenue to the fund for [PBGC] to carry out its functions under this subchapter.").

[6] Application of the plain meaning rule does not preclude consideration of persuasive legislative history. March v. United States, 506 F.2d 1306, 1313-14 & n.29 (D.C. Cir. 1974). Legislative history, however, does not support appellants' contention that PBGC must adhere inflexibly to the "ceased to accrue" test.

We therefore reject appellants' argument that PBGC's decision to use the "other reasonable basis" test was arbitrary, capricious, and an abuse of discretion.[7]

2. PBGC's Decision that the Georgia-Pacific Pension Plan Terminated Before July 1, 1974

PBGC decided, pursuant to its application of the "other reasonable basis" test, that the Georgia-Pacific Pension Plan terminated before July 1, 1974. Appellants contend that this decision was arbitrary and capricious. Appellants emphasize that two Portage plant employees worked in the plant and accrued pension benefits from July 1 to July 4, 1974. Twelve employees received vacation pay after July 1, 1974 for vacation time earned before that date. Nine employees received "shortage accrued vacation pay" after July 1, 1974.[8] Appellants argue that these events demonstrate that the plan did not terminate before July 1, 1974.

Our standard of review is governed by the Administrative Procedure Act, which requires us

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[7] We also reject appellants' argument that PBGC's selection of the "other reasonable basis" test violated a rule of statutory construction by effectively excising from ERISA the "ceased to accrue" test. This argument ignores that section 1461(b) on its face gives PBGC discretion to use either test. Moreover, PBGC did not ignore the "ceased to accrue" test. PBGC used several "ceased to accrue" criteria in its application of the "other reasonable basis" test. *See infra* p. 11.

[8] Shortage pay represents erroneously unpaid earned wages. Although nothing in the Administrative Record established that employees received shortage pay after July 1, 1974, the district court considered this fact when it granted summary judgment to PBGC. J.A. at 593.

Twelve employees also received holiday pay for July 4, 1974. We note, however, that they may have been ineligible for such pay because they did not work in July 1974. Appellants' collective bargaining agreement provided holiday pay only to employees who were on active payroll during all or part of the week during which a holiday fell. J.A. at 241.

> to strike "agency action, findings and conclusions" that we find to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." This standard of review . . . presumes agency action to be valid. Moreover, it forbids the court's substituting its judgment for that of the agency, and requires affirmance if a rational basis exists for the agency's decision.

Ethyl Corp. v. Environmental Protection Agency, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc) (quoting Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (citations and footnotes omitted). In applying this standard, we must consider whether PBGC's determination that the pension plan terminated before the window period "was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)).

PBGC considered the following factors in determining that the Georgia-Pacific Pension Plan terminated before July 1, 1974: (1) the date of termination set by the Plan Administrator, (2) the number of participants for whom benefits continued to accrue and the length of time over which those benefits accrued, (3) the date work terminated for the participants, (4) the date employer contributions ceased, (5) the type of work performed for which pension benefits accrued, and (6) the accrual of holiday or vacation benefits. J.A. at 596-97. We find these factors are eminently relevant to a determination of when the pension plan terminated.[9]

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[9] PBGC views pension plan termination as a process rather than a discrete incident because termination typically occurs over a number of months and encompasses a number of events. Accordingly, when applying the "other reasonable basis" test, PBGC determines whether a plan has terminated based on

In applying these factors,[10] PBGC found that the pension plan terminated before the window period based on the *de minimis* participation by appellants in the plan after June 30, 1974. The facts revealed that Georgia-Pacific announced in March 1974 that the Portage plant would close by June 30, 1974; the plant ceased production operations in June 1974; all but two employees were terminated by June 30, 1974; these two employees worked only three days in July, and their work consisted entirely of plant shutdown operations; except for these two employees, Georgia-Pacific made neither contributions to the pension plan nor vacation payments to appellants for work performed after June 30, 1974. J.A. at 29, 106, 593. In light of these facts, we cannot say that PBGC committed a clear error of judgment in deciding that the plan terminated before the window period. Accordingly, we find that PBGC was not arbitrary and capricious in deciding that the plan terminated before July 1, 1974.

3. PBGC's Case-by-Case Method for Determining Period Coverage

Appellants contend that PBGC abused its discretion in failing to promulgate rules governing the eligibility of pension plans seeking window period coverage. Relying on *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947), appellants aver that agencies are restricted in their ability to make case-by-case determinations to one of three situations: (1) where the agency must solve a

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the specific facts and circumstances underlying the activities of the pension plan participants. We do not find this approach to be an abuse of discretion.

[10] No party disputes the adequacy of PBGC's factfinding procedures in this case. Prior to its June 1975 decision, PBGC accorded all parties the opportunity to submit relevant information. Moreover, notwithstanding its June 1975 decision, PBGC continued thereafter for more than two years to seek and consider information from the parties.

problem that it could not reasonably foresee; (2) where the agency has insufficient experience with a problem to warrant rigidifying its tentative judgment into a rule; and (3) where the problem is so specialized that it cannot be captured within the boundaries of a rule. Brief for Appellants at 49-50. Appellants assert that the instant case fits none of these situations, and therefore PBGC was arbitrary and capricious in its failure to promulgate rules.[11]

Although an agency is not unfettered in its choice of whether to proceed by general rule or by case-by-case determination, that "choice . . . is one that lies primarily in the informed discretion of the administrative agency." *Chenery*, 332 U.S. at 203. We believe that PBGC was justified in choosing a case-by-case approach for window period determinations.

PBGC came into existence on September 2, 1974 charged with the responsibility of administering a complex and novel pension plan insurance program. One of PBGC's challenges was the task of processing window period claims. Because the filing of window period claims was limited to the two-month period between September 2 and October 31, 1974, 29 U.S.C. § 1461(b)(4), only about 200 claims were filed. PBGC chose to process this finite number of claims on a case-by-case basis. In view of the limited utility of a window period regulation, the demand for immediate disposition of window period claims; and the fact that appellants were afforded ample opportunity to present information to PBGC concerning their claim, we find that PBGC did not abuse its discretion in choosing to make window period decisions on a

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[11] ERISA established a cut-off date of October 31, 1974 for filing window period claims. 29 U.S.C. § 1461(b)(4). Because PBGC was dealing with a finite number of claims filed in a short period of time, appellants contend that PBGC knew the parameters of the problem with which it was dealing and therefore was bound by *Chenery* to promulgate rules.

case-by-case basis. *See generally A-T-O, Inc. v. PBGC*, 634 F.2d 1013, 1023-24 (6th Cir. 1980).

B. *Appellants' Claims Against Brown and Georgia-Pacific*

1. The Companies' Alleged Oral Promises

Appellants contend that the district court erred in finding that their cause of action against Brown and Georgia-Pacific for breach of oral promises was barred by the applicable three-year statute of limitations.[12] Appellants argue that the complaint they filed in May 1979 was timely because the cause of action accrued on one of three dates: 1) in October 1977, when PBGC conclusively denied appellants' window period claim; 2) in July 1977, when the trustees of the Georgia-Pacific Pension Plan purchased the annuity which would pay reduced pension benefits; or 3) in July 1978, when the litigation between Georgia-Pacific and Brown for appellants' pro rata share from the Brown Pension Plan was resolved.[13]

It is well established that the statute of limitations for breach of an oral promise begins to run from the time of the breach. *See Hoffa v. Fitzsimmons*, 499 F. Supp.

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[12] Appellants concede that the applicable statute of limitations is three years. J.A. at 917. Appellants challenge the district court's finding that the breach occurred no later than April 1975.

[13] Under the terms of the purchase and sale agreement for the Portage plant, Brown was obligated to deliver to Georgia-Pacific appellants' pro rata share of the money in the Brown Pension Plan. *See supra* note 1. In 1972, Georgia-Pacific brought suit alleging that Brown had failed to deliver appellants' pro rata share of the money. The court found Brown liable for approximately $60,000. Georgia-Pacific Corp. v. Brown Co., No. K 18-72 (W.D. Mich., Mar. 21, 1978), *aff'd*, 636 F.2d 1217 (6th Cir. 1980). Georgia-Pacific deposited the money it recovered from Brown in the Georgia-Pacific Pension Plan. J.A. at 912.

357, 366 n.39 (D.D.C. 1980), *remanded on other grounds*, 673 F.2d 1345 (D.C. Cir. 1982). Contrary to appellants' assertion, the companies' oral promises, if they exist at all, were breached no later than April 1975. By April 1975, the trustees of the Georgia-Pacific Pension Plan had notified appellants of the decision to reduce appellants' pension benefits. Appellants could then have sued the companies for breach of oral promise. Because appellants waited until May 1979 to file their complaint, they are barred by the three-year statute of limitations. *See Oppenheim v. Campbell*, 571 F.2d 660, 662 (D.C. Cir. 1978) (litigant's action accrues when his right to resort to court is perfected).

The alternative dates asserted by appellants must be rejected. As the district court noted:

> [Appellants] advance the untenable legal position that a statute of limitations on one claim does not run until [appellants] exhaust all other potential claims that could eliminate their alleged loss. That argument must be rejected because it would allow plaintiffs to determine when various statutes of limitations commence dependent upon the legal theories they choose to advance at a particular time. Statutes of limitations must remain objective standards that are triggered as soon as litigants' rights have been breached.

J.A. at 918-A to 919 (footnote omitted). Appellants' alleged rights were breached no later than April 1975. Accordingly, appellants are barred by the statute of limitations in their claim against the companies for breach of oral promises.[14]

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[14] The district court held that appellants' claim for breach of oral promises also is barred both by the Georgia-Pacific collective bargaining agreement and by appellants' failure to present a sufficient claim for promissory estoppel or unjust enrichment to withstand summary judgment. Because we hold

2. Alleged Contractual Guarantees Arising From the Purchase and Sale Agreement

Appellants contend that the district court erred in finding they have no contractual rights under the purchase and sale agreement. Appellants argue that they are third party beneficiaries of the agreement, and that both companies guaranteed in article 7(b) that the benefits under the Georgia-Pacific Pension Plan would be equal to or better than those under the Brown Pension Plan.

Assuming, but not holding, that appellants are third party beneficiaries,[15] we agree with the district court that article 7(b) of "the agreement provides no support for an express or implied promise by either Brown or [Georgia-Pacific] to guarantee [appellants'] pension funds." J.A. at 916. Articles 7(b)(i) and (ii) require Georgia-Pacific to bargain collectively with appellants on the subject of pensions, and to establish as a "goal" pension benefits for appellants "comparable" to those appellants would have received under the Brown Pension

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that appellants' claim is barred by the statute of limitations, we need not address the merits of these other independent bars to appellants' claim.

With regard to appellants' assertion that the companies should be estopped from asserting a statute of limitations defense, we find no support in the record that the companies made any statement or engaged in any conduct that tended to lull appellants into inaction. *See* Emersons Ltd. v. Max Wolman Co., 388 F. Supp. 729, 732 (D.D.C. 1975), *aff'd*, 530 F.2d 1093 (D.C. Cir. 1976). Georgia-Pacific's suit against Brown to recover appellants' pro rata share of the Brown Pension Plan was no indication that appellants should wait to file suit on an entirely unrelated claim. Similarly, Georgia-Pacific's efforts on appellants' behalf to obtain window period coverage for the Georgia-Pacific Pension Plan should not have lulled appellants into inaction, but should have alerted them to Georgia-Pacific's position that it had no legal obligation to guarantee appellants' pension benefits.

[15] The district court found that appellants were not third party beneficiaries of the agreement. J.A. at 915.

Plan. *Supra* note 1. Setting a "goal" of achieving "comparable" benefits in collective bargaining does not constitute a binding promise that such benefits will be achieved.[16] Moreover, and more importantly, Georgia-Pacific fully complied with articles 7(b)(i) and (ii) when it entered into a collective bargaining agreement that provided pension benefits that were at least "comparable" to those provided by Brown.[17]

Similarly, we find no basis for a contractual claim based on article 7(b)(iii) of the agreement. Under that provision, Brown agreed to transfer to Georgia-Pacific appellants' pro rata share of money in the Brown Pension Plan, and Georgia-Pacific agreed to apply this money to appellants' new pension plan. *Supra* note 1. Both companies fully complied with this provision. Moreover, any claim that Brown transferred an inadequate amount of money to Georgia-Pacific has been fully adjudicated. *See supra* note 13. Accordingly, appellants may not now assert contractual rights under article 7(b) of the agreement.[18]

III. Conclusion

For the reasons stated, we affirm the district court's judgments for PBGC, Brown, and Georgia-Pacific.

Affirmed.

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[16] Indeed, even the "goal" of comparable benefits was circumscribed by the following qualifying language: "except as changes may be mutually agreed upon between [Georgia-Pacific] and [appellants' representatives]." *Supra* note 1.

[17] Significantly, the district court stated that the Georgia-Pacific Pension Plan "appeared to be a superior pension program to the Brown program . . . ." J.A. at 926 n.*.

[18] Appellants also assert that the district court erred in granting summary judgment in favor of Brown and Georgia-Pacific. We hold that the companies were entitled to summary judgment because no genuine issues of material fact existed. *See* National Ass'n of Gov't Employees v. Campbell, 593 F.2d 1023, 1027 (D.C. Cir. 1978).

WALD, *Circuit Judge*, dissenting in part: Over 250 people, many of whom had worked in the same factory for several decades, had their monthly pension payments cut by seventy-five percent—from $6.00 to $1.50 per month for each year of service—when their employer shut down the plant at which they were employed. They brought a claim under the Employee Retirement Income Security Act (ERISA), a statute that was passed in order to avoid precisely the kind of tragedy recounted here. Although there is no question that the Pension Benefit Guaranty Corporation (PBGC) was statutorily authorized to extend coverage to the appellants, it rejected their claims. The majority upholds the PBGC's decision as a reasonable exercise of its discretion under the statute. Because I believe that the PBGC did not, as it was required to do, construe the statute in light of its resounding remedial purpose, I dissent from the majority's decision upholding the district court's grant of summary judgment to the PBGC. I would remand to the district court to require the PBGC to give a persuasive explanation as to why its stingy construction of the statute comports with Congress' explicitly generous purpose in making ERISA's federal guarantees retroactively apply to plans terminated within the two months before the Act was passed.

As the Supreme Court has recognized, "[o]ne of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp.* v. *PBGC*, 446 U.S. 359, 374-375 (1980) (footnote omitted).[1] The

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[1] The legislative history, *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., *Legislative History of the Employee Retirement Income Security Act of 1974* (1976) [hereinafter cited as "Legislative History"], is replete with tragic stories like that before us. *See, e.g.*, 3 Legislative History at 4665 (statement of Rep.

most telling expression of ERISA's broad remedial purpose was the extraordinary provision before us, retroactively guaranteeing the pension benefits of employees whose pension plans terminated as early as July 1, 1974, over two months before ERISA was enacted. "In order to provide prompt and effective protection for the employees concerned," [2] Congress decided "to afford the [PBGC] emergency authority to institute insurance protection on a 'crash' basis," [3] well before it could put into effect ERISA's provisions for employer liability, reporting and other measures aimed at protecting the PBGC's financial integrity. As Senator Williams, chairman of the conference committee, explained to his colleagues, "[t]his was done in recognition of the fact that depressed economic conditions in certain regions created the possibility that a number of plans were in critical straits and were terminating or were likely to do so imminently." [4] The addition of such "window period" coverage demonstrates an inclination to come down on the side of generosity toward workers whose expectation of adequate retirement income has been devastated, casting a long and threatening shadow over their later years.

The statute provides that the PBGC *shall* pay benefits for certain plans that terminated after June 30, 1974, and before September 2, 1974, the date of enactment, and that the PBGC shall determine whether a plan has

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Thompson); *id.* at 4694 (remarks of Rep. Brademas); *id.* at 4712-13 (remarks of Rep. Ford); *id.* at 4716-17 (remarks of Rep. Daniels); *id.* at 4749-50 (remarks of Sen. Javits); *id.* at 4792-94 (remarks of Sen. Bentsen).

[2] *Id.* at 4678 (statement of Rep. Ullman introducing and explaining conference committee report and changes).

[3] *Id.* at 4766 (remarks of Sen. Williams, conference committee chairman, explaining committee bill).

[4] *Id.*

terminated within the two month period "on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection." 29 U.S.C. § 1461(b). One member of the conference committee, which drafted the "window period" provision, explained that it would extend coverage to a plan much like that of these appellants. Representative Thompson thus recommended the bill to his colleagues in part as follows:

> In my own district, the Roebling plant of the Colorado Fuel and Iron Co. was closed June 30 thereby thrusting almost 1,400 men and women into the ranks of the unemployed. Many of these employees had 30 to 35 years of service in the plant . . . . Although the plant ceased operation June 30, the pension plan for those employees continues in existence. The conference substitute covers all pension plant [sic] terminations of single employer plans occurring after July 1, 1974. Inasmuch as the Roebling pension plan was not terminated prior to July 1, 1974, within the meaning of the term as used in the conference report, the plant and its employees are covered [by section 1461(b)].[5]

Congress thus appears to have contemplated coverage under section 1461(b) of a plan for a plant in which *no* employees worked during the window period.

Even if one were to discount the significance of such remarks, however, the interpretation of ERISA "must be guided by the familiar canon of statutory construction that remedial legislation must be construed broadly to effectuate its purposes." *Tcherepnin* v. *Knight*, 389 U.S. 332, 336 (1967). *Accord Peyton* v. *Rowe*, 391 U.S. 54, 65 (1968); *International Union, UAW* v. *Marshall*, 584 F.2d 390, 396 (D.C. Cir. 1978); *National Automatic Laundry & Cleaning Council* v. *Schultz*, 443 F.2d 689, 706 (D.C. Cir. 1971). This court has gone even

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[5] *Id.* at 4665.

further and articulated "as a reasonable corollary" of this basic doctrine the principle "that when a petitioner under a government benefits program puts forward an interpretation of a legislative provision that is arguably consonant with the statutory language, he is at least entitled to a reasoned statement why the administrator will not adopt that interpretation." *UAW* v. *Marshall*, 584 F.2d at 396.

In the *UAW* case we were required to determine whether the Secretary of Labor had properly construed a provision in the Trade Act of 1974, a primary purpose of which was to expand eligibility for "worker adjustment assistance" for employees displaced by increased competition from imports in their industry. Eligibility under the 1974 Act turned in part on whether increased competition from imports contributed importantly to the separation of a significant number of workers "in a firm or an appropriate subdivision thereof." In the absence of any specific legislative history behind this clause, the Secretary had determined that the largest "appropriate subdivision" for the purposes of this provision was the individual plant. The UAW had argued for larger subunits, such as all the plants involved in production of a particular car model which would have expanded eligibility. It contended that the use of "an" before "appropriate subdivision" supported its interpretation that several subdivisions were possible and that "an appropriate subdivision" need not be the most appropriate subdivision. Finding the UAW's interpretation plausible, this court remanded to the Secretary for an explanation of the circumstances that he believed *mandated* the choice of the plant as the appropriate subdivision in light of this duty "to choose a subdivision that best effectuates the purposes of the Trade Act."

The *UAW* case is an application of the familiar principle that an agency's interpretation of statutory language, which we ordinarily will uphold as long as it is

reasonable, must be consistent with the purpose of the legislation. Where the language at issue is part of a novel and comprehensive remedial scheme like ERISA, the *UAW* case teaches that this principle has a sharper edge to it: If a putative beneficiary advances a plausible interpretation of the statute, the agency must at least give a rational explanation for why its own more restrictive interpretation is nevertheless reasonable in light of the purpose of the legislation.[6] I do not believe we have been given any satisfactory explanation by PBGC here as to why it rejected the appellants' interpretation.

The PBGC, now backed by the majority, asserts that a countervailing legislative purpose—that of ensuring the financial integrity of the insurance fund and of keeping premiums low—justifies its niggardly construction of eligibility under section 1461. I find such a generalized economic justification wholly inadequate. First, every piece of remedial legislation that involves the disbursement of money has a secondary "purpose" of not disbursing *too much* money and thus endangering the program. In the *UAW* case itself, there was surely a legislative purpose to conserve funds for those whose jobs were most clearly affected by imports. But until the agency could demonstrate that this secondary purpose was actually undermined by the petitioner's construction of the statute, it was governed instead by the overrid-

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[6] This does not mean, of course, that the agency must accept the interpretation that will result in eligibility for the largest number of persons. In the *UAW* case after remand, for example, we upheld the Secretary's decision to use the individual plant as the largest appropriate subdivision after he demonstrated that any larger subdivision would result in a windfall to large numbers of workers whose jobs had not been significantly affected by competition from imports. International Union, UAW v. Marshall, 627 F.2d 559 (D.C. Cir. 1980). The *UAW* case means simply that the reasonableness of an agency's statutory interpretation, and of its rejection of another more generous and fully plausible interpretation, must be evaluated in light of the statute's broad remedial purpose.

ing remedial purpose of affording coverage in cases that reasonably came within the statutory eligibility definition.

In this case, the PBGC has not attempted to demonstrate that the financial integrity of its insurance fund would be threatened or the employers' premiums affected by a decision to cover the appellants' pension benefits. Because of the unusual finite nature of "window period" claims, the PBGC concedes that a decision in favor of the appellants here would probably not affect a single other case. There are no floodgates; the window has already been closed for several years, precluding any substantial drain on ERISA's funds.

The PBGC also concedes it has the statutory authority to extend coverage to these claimants under section 1461(b), since it is undisputed that benefits ceased to "accrue" during the window period. However, enveloping itself in the comfortable cloak of agency discretion, the PBGC has decided not to apply the simple and objective test of when benefits no longer accrue but rather to determine the eligibility of all "window period" claimants solely under the second statutory criterion, "any other reasonable basis consistent with the purposes of this subsection." According to the PBGC, the statute's use of the disjunctive "or" grants it the discretion to read out of the statute the "accrual of benefits" test and to apply the "any reasonable basis" test in every case. The majority agrees.

I disagree. The PBGC's (and now the majority's) interpretation of the statute renders meaningless the first and more objective "accrual of benefits" test. This, of course, violates "[t]he cardinal principle of statutory construction [which is] to save and not to destroy . . . [and] to give effect, if possible, to every clause and word of a statute." *United States* v. *Menash*, 348 U.S. 528, 538-39 (1955). To avoid this result, appellants read the statute as granting the PBGC the discretion under the second test to expand coverage to some who would

not qualify under the "accrual of benefits" test, but not the discretion to deny coverage where it would be authorized under the first test. Such an interpretation would give effect to every clause in the statute and would be far more consistent with the remedial purpose of ERISA and section 1461(b).[7] This construction would also avoid the counterintuitive result reached by the PBGC in this case, where it concluded that a plan had terminated before benefits under the plan had "ceased to accrue."

The PBGC achieves this result by deciding that section 1461(b) coverage does not extend to plans that, according to a balancing of all the factors under the "other reasonable basis" test, have "effectively" or "substantially" terminated before the "window period." The PBGC thus appears to have read into section 1461(b) an additional stumbling block for claimants that would be unwarranted even if one accepted the PBGC's argument that it has absolute discretion to choose the "any other reasonable basis" test for deciding when a plan "terminated." Counsel for the PBGC at oral argument had difficulty saying that this plan had actually terminated before July 1, 1974, but could say only that the *process* of plan termination had gone far enough to justify its conclusion that the plan had terminated.

In support thereof the majority and the PBGC emphasize the marginal nature of the accrual of benefits within the "window period." Of course, anytime a statute sets out a clear bright line and objective criteria for placing cases on one side or another, it is almost inevitable that some cases will fall very close to the line. But it is an important virtue of clear and objective criteria that they provide a ready way to resolve those close cases. The PBGC would abandon the clear line sug-

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[7] Such an interpretation would also be consistent with Representative Thompson's expectation that the Roebling plan would be covered by section 1461(b). *See supra* p. 3.

gested by Congress for a balancing of all the relevant factors, a method of decisionmaking that maximizes its own discretion. It would further expand its discretion by permitting exclusion of plans that have substantially terminated (but not yet actually terminated). I do not believe that the "plain language" of section 1461(b) vests so much discretion in the PBGC.

In my view, the PBGC has squeezed every last drop of agency discretion it could extract—and some it rightly couldn't—from a few words of a statutory scheme intended to remedy the disastrous consequences of pension plan collapse, and thus drowned the only hope these 250 individuals had of restoring a measure of retirement security. I cannot approve this result as a reasonable one based on a reasonable construction of section 1461 (b) of ERISA. I therefore respectfully dissent.

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRISCILLA BELLAND, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	Civil Action
	:	No. 79-1248
PENSION BENEFIT GUARANTY CORPORATION, et al.	:	
	:	
Defendants	:	

MEMORANDUM OPINION

Plaintiffs, participants in the Georgia-Pacific Portage Division Pension Plan (Plan), challenge the administrative decision of defendant Pension Benefit Guaranty Corporation (PBGC) that the Plan terminated before July 1, 1974, and Plan benefits, therefore, are not guaranteed by PBGC under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1301 *et seq.* (1976).[1] Plaintiffs seek an order setting aside PBGC's determination and request that this Court direct PBGC to

[1]This statute established the Pension Benefit Guaranty Corporation to administer pension benefit guaranty funds. Title IV of ERISA provides a comprehensive insurance program for pension plans which terminate when a company ceases to exist, thereby protecting workers who might otherwise be deprived of their earned retirement benefits.

grant pension plan insurance coverage under 29 U.S.C. §1381(b).[2]

This matter is presently before the court on plaintiffs' motion for partial summary judgment against only PBGC, one of four defendants in this action. Georgia-Pacific Corporation and Brown Company, also defendants herein, filed memoranda supporting the position of plaintiffs. Defendant PBGC filed a cross-motion for summary judgment. The remaining defendant, United Paperworkers International Union (UPIU), has taken no position with regard to the motions for summary judgment but has moved to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. UPIU's motion to dismiss is not now under consideration.

BACKGROUND

This suit arose out of a series of events beginning with the sale by Brown Company of its Plant 11 in Portage, Michigan, to Georgia-Pacific and the transfer of most of the Plant 11 employees to Georgia-Pacific. In March 1974, Georgia-Pacific announced its intention to close the plant by June 30, 1974. On or about June 1, 1974, only twenty-three employees remained. All production ceased and a majority of the employees were terminated by June 30. Two employees, Charles Drake and Robert Warner, worked for the company, however, on July 1-3, 1974. Twelve Plan participants received holiday pay for July 4, 1974,

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[2]Although ERISA was not enacted until September 2, 1974, Congress created a special window period from July 1, 1974 until September 1, 1974. This provided plan termination insurance for qualified single employer pension plans which terminated during this so called "window period."

and vacation pay for time earned before July 1. In addition, nine participants received "shortage accrued vacation pay" on or after July 1, 1974.

On September 13, 1974, timely application was made to PBGC on behalf of plaintiffs for pension plan termination insurance coverage under the "window period" pursuant to 29 U.S.C. §1381(b) of ERISA. PBGC decided on June 27, 1975, that the Plan terminated prior to July 1, 1974, and was thus not covered by ERISA's plan termination insurance program. In December 9175, PBGC reconsidered its earlier determination and reviewed additional factual materials submitted by representatives of Georgia-Pacific and UPIU. Following its review, PBGC notified Georgia-Pacific and UPIU that it reaffirmed its June 1975 decision.

Pursuant to the requests of various state and federal elected officials, PBGC reopened the case in June 1976 and after specifically requesting data from Georgia-Pacific concerning vacation accruals and other information concerning employment at Plant 11 during June 1974, PBGC, on October 21, 1976, reaffirmed its prior decision.

Plaintiffs maintain that 29 U.S.C. §1381(b) provides two criteria for PBGC to determine whether a plan is guaranteed for benefits: (1) the date on which benefits ceased to accrue or (2) on any other reasonable basis consistent with the purposes of this subsection. Plaintiffs argue that PBGC's decision to deny benefits based on the second criterion when the date benefits accrued to the Plan, under the first criterion, would have qualified the Plan for benefits was arbitrary, capricious, an abuse of discretion and inconsistent with the purpose and Congressional intent underlying ERISA. Plaintiffs further contend that if PBGC did not abuse its discretion by using the "any

other reasonable basis" standard, PBGC has violated the Administrative Procedures Act, 5 U.S.C. §701 *et seq.* (1976) in failing to promulgate rules regarding the factors it applied under this criterion.

Defendant, in support of its motion for summary judgment, contends that as the agency delegated the duty and authority by Congress to make determinations of whether pension plans terminated during the "window period" qualify for insurance benefits, its decision, after full and careful consideration, that the Plan should not be insured for benefits under 29 U.S.C. §138(b) was reasonable. Defendant maintains, therefore, that its action was neither arbitrary, capricious, nor an abuse of discretion and accordingly should not be set aside.

Standard and Scope of Review

This Court's function is limited to a review of PBGC's decision pursuant to the Administrative Procedure Act, 5 U.S.C. §706(2) which provides in pertinent part that the reviewing court shall:

> hold unlawful and set aside agency action, findings, and conclusions found to be —
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

It is well-settled that this standard of review is a highly deferential one and the reviewing court's inquiry entails careful consideration of whether the agency's decision is

supported by a rational basis. *Ethyl Corporation* v. *EPA*, 176 U.S. App. D.C. 373, 541 F.2d (*en banc*) *cert. denied*, 426 U.S. 941 (1976). In the context of ERISA, the determination of the Pension Benefit Guaranty Corporation is entitled to great deference in the construction and application of the statute. *Connolly* v. *Pension Benefit Guaranty Corporation*, 581 F.2d 729, 730-731 (9th Cir. 1978). If the agency decision has a rational basis, it may not be nullified by a reviewing court, even though the court would have disagreed with the agency and reached a different conclusion. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 410 U.S. 401, 419 (1970). The focal point for judicial review is fundamentally an inquiry into the reasonableness of the agency's decision based on the record before it and not a review of new evidence outside that record. *Environmental Defense Fund, Inc.* v. *Costle*, No. 79-2432 (D.C. Cir. April 21, 1981) slip op. at 18; *Doraiswamy* v. *Secretary of Labor*, 180 U.S. App. D.C. 360, 555 F.2d 832, 840 (1976). The Court, therefore, has confined itself to a review of the administrative record before PBGC.[3]

DISCUSSION

Both movants agree that there are no genuine issues of material fact in dispute and that the only issue before the Court is a question of law. Whether the decision of PBGC to deny pension insurance for the Plan, pursuant to 29 U.S.C. §1381(b), was arbitrary, capricious, an abuse of discretion or inconsistent with law, is the issue for consideration and, as such, is appropriate for summary judgment.

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[3]Plaintiffs have offered affidavits which are not included in the administrative record.

ERISA is a complex piece of legislation designed to improve the American pension system. Title IV of the Act, effective September 2, 1974, enabled PBGC to provide coverage to employees whose pension plans terminated on or after September 2, 1974. 29 U.S.C. §§1322, 1381(a). Congress, recognizing that such legislation was long overdue, made an exception with respect to the effective date and permitted PBGC to guarantee benefits to plans terminating after June 30, 1974, and before September 2, 1974. Authority was granted to PBGC to determine whether a given plan terminated within this interim period, commonly known as the "window period." 29 U.S.C. §1381(b). In making such decisions the satute requires that PBGC not grant "window period" coverage unless it "finds substantial evidence that the plan terminated for a reasonable business purpose. . .[4] and PBGC "shall make the determination on the basis of the date on which benefits cease to accrue *or* any other reasonable basis consistent with the purpose of this subsection." 29 U.S.C. §1381(b). (Emphasis added.)

With these principles in mind, the Court turns to the challenged decision. PBGC did not rest its decision to deny benefits to plaintiffs on a determination of the date benefits ceased to accrue but reached its decision based on the second criterion of the statute. Plaintiffs contend PBGC abused its discretion by disregarding "the date which benefits ceased to accrue" criterion and violated the Congressional intent underlying the Act which requires a liberal construction of ERISA to insurance pension plans. Defendant contends it is within its authority and discretion to select either criterion to determine a pension plan ter-

[4]It is not disputed by the parties that Plant 11 closed for legitimate business reasons.

mination, and the selection and utilization of "any other reasonable basis" is entirely consistent with the statute. Congress specifically delegated the responsibility of identifying pension plans eligible for "window period" coverage to PBGC. 29 U.S.C. §1381(b). There is no authority for the proposition that Congress directed PBGC to adhere inflexibility to the cessation of accruals test. The language of the statute leaves the decision of which criteria to employ in assessing plan terminations solely to PBGC. PBGC's decision to use the "any other reasonable basis" test cannot be attacked as an abuse of discretion when the statute clearly accords it the discretion to use either criteria.

Plaintiffs argue that if the decision to apply the "any other reasonable basis" criterion is found to be within PBGC's discretion, then the practical application of this criterion is inconsistent with the purpose of the statute. PBGC, in utilizing the "any other reasonable basis" criterion, considered these factors,

A. The date of termination set by the Plan Administrator

B. The number of participants for whom benefits continued to accrue and the length of time over which those benefits accrued

C The date work terminated for the participants

D. The date employer contributions ceased

E. The type of work performed for which pension benefits are accrued

F. The accrual of holiday or vacation pension benefits,

and decided there was "insubstantial participation" in the Plan; thus, pension insurance benefits were denied. These

factors, according to PBGC, are used on a case-by-case basis. Plaintiffs contend the Congressional purpose of ERISA was to provide protection for their retirement funds and cite relevant portions of the Act's legislative history to support their position. They argue that PBGC's failure to promulgate regulations regarding the six factors utilized in the decision-making was violative of legislative intent and the Administrative Procedure Act, (APA) 5 U.S.C. §552(a)(1) (1976).[5] Additionally, it is argued that such use had the effect of narrowing plan termination insurance coverage contrary to the intent of Congress. Defendant maintains that its approach to making plan termination decisions using these factors on an *ad hoc* basis is reasonable, authorized, and necesary in view of the excessive number of window period applications. Defendant cites *SEC* v. *Chenery,* 332 U.S. 194 (1947) for the proposition that agency action can proceed on a case-by-case basis without the promulgation of regulations as outlined in the APA, and judicial deference should be given to this type of agency action especially when the decision to be made is within the agency's expertise. In this respect, plaintiffs argue that PBGC should not receive judicial deference because it is a new agency that lacks accumulated experience. The Court is not persuaded by plaintiffs arguments. The Court of Appeals for the Sixth Circuit in *A-T-O, Inc.* v. *Pension Benefit Guaranty Corporation,* No. 78-3269, slip op. (6th Cir. Nov. 12, 1980), upheld PBGC's decision not to issue a regulation in regard to another ERISA section similar to the "window period," in that it was only operative during a limited period. The court there con-

[5] *5 U.S.C.* §552(a)(1) provides that any agency shall separately state and publish in the Federal Register substantive rules or general policy adopted by the agency for guidance of the public.

cluded that a regulation was not required where there was a need for prompt resolution and the plaintiff had ample opportunity to submit its factual and legal arguments to the agency. In the instant case, the need for expected resolution was great and plaintiffs were afforded not only the opportunity to initially present information to PBGC but also an opportunity to comment on the final decision.

In handling applications submitted for pension termination insurance, PBGC defined and applied a set of factors it determined would afford a reasonable and careful method of considering all relevant factors in making a decision on "window period" coverage. A brief recitation of certain critical facts from the record will demonstrate the reasonableness of the agency's decision. The record reflects that Georgia-Pacific made the decision to close Plant 11 by June 30, 1974, informed PBGC that all Plan activity terminated on that date, and that a check was transmitted to the Plan in July 1974 for employer contributions due and owing prior to July 1, 1974.

It is uncontroverted that production ceased at Plant 11 in June 1974. The record, however, reflects that two employees did work at the plant after June 30 and accrued salary, vacation, and pension benefits from July 1-4, 1974. Moreover, Georgia-Pacific, after June 30, had occasion to issue checks to certain former employees for either work performed or accrued vacation pay earned prior to July 1. After being advised by Georgia-Pacific of the pension benefit accruals in July 1974, PBGC found such contributions "insubstantial participation" for the purpose of "window period" coverage.

The Court is, therefore, of the opinion that PBGC's denial of pension benefit insurance to the Plan was neither arbitrary, capricious, nor without a substantial reasonable

basis. Accordingly, summary judgment must be granted in favor of defendant PBGC. An order consistent with this opinon will be entered.

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STATES DISTRICT JUDGE

Dated: June 30, 1981

FILED
JUN 30 1981
JAMES F. DAVEY, Clerk

RECEIVED
Jul 6 1981

PLAINTIFF'S EXHIBIT A

Pension Benefit Guaranty Corporation

27 June 1975

Mr. John W. Hill
Miller, Anderson, Nash,
Yerke & Wiener
900 S.W. Fifth Avenue
Portland, Oregon 97204

Dear Mr. Hill:

This is in response to your letter of May 15, 1975 concerning the Georgia-Pacific Portage Division pension plan (§110-135).

According to the materials in this Corporation's files, Georgia-Pacific closed its Portage, Michigan plant in June 1974. All employees except two ceased employment by June 30, 1974. The two exceptions were employed on the first three days in July. All benefit accruals except for these two employees also ceased by June 30, 1974. The collective bargaining agreement tied Georgia-Pacific's contributions to hours worked and, except with respect to the two employees mentioned above, no contributions were made for work performed after June 30, 1974. In view of the insubstantial accruals and contributions with respect to the period subsequent to June 30, 1974, this Corporation has determined that the Portage Division pension plan in substance terminated prior to July 1, 1974. Consequently, Section 4082(b) of the Employee Retirement Income Security Act of 1974 does not authorize this Corporation to guarantee benefits upon termination of the Plan under the Act.

Accordingly, unless there are additional facts bearing on this matter which you bring to our attention within 30 days

from the date of this letter, we will close our file on this case.

Sincerely,

/s/ BL
CC: BLevine:bf:6/25/75

PENSION BENEFIT GUARANTY CORPORATION
P.O. BOX 7119
WASHINGTON, D.C. 20044

In Reply Refer to: Case No. 110-135

DEC 24 1975

Mr. John W. Hill
Miller, Anderson, Nash
Yerke & Weiner
900 S. W. Fifth Avenue
Portland, Oregon 97204

Dear Mr. Hill:

The Pension Benefit Guarantee Corporation ("the PBGC") has reviewed its determination not to guarantee basic benefits in connection with the termination of the Georgia-Pacifc Portage Division Pension Plan ("the Plan") (File #110-135). In undertaking this review, the PBGC has reviewed the files upon which it relied in reaching its earlier determination, the comments of those individuals such as yourself who attended a meeting at the PBGC on August 21, 1975, and the additional information submitted by you, Senator Welborn and Mr. Paul J. Gross

As a result of this review, the PBGC has reaffirmed its prior determination. We have considered representations that pay checks with respect to work performed before June 30, 1974 were dated after June 30, 1974, that subsequent to June 30, 1974 twelve employees received accrued vacation pay and that nine employees were paid holiday pay for July 4, 1974. We have also reviewed your report that the holiday and vacation payments gave rise to benefit accruals and employer contributions.

In comparison with the approximately 150 participants who left employment on or before June 30, 1974 as a

result of the shut-down, the number of employees who received pension credits after June 30, 1974 is too insubstantial to overcome our view that the Plan effectively terminated on or before that date. Furthermore, the new information does not undermine the basis of our original decision which was that, except for two employees, no employee accrued benefits for actual work performed after June 30, 1974. Under the circumstances, we are precluded by Section 4082(b) of the Employee Retirement Income Security Act of 1974 from guaranteeing benefits upon the termination of the Georgia-Pacific Portage Division Pension Plan.

Sincerely yours,

Steven E. Schanes
Executive Director

cc: Honorable Jack Welborn
Paul J. Gross

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

[June 16, 1976]

Honorable Garry Brown
House of Representatives
Washington, D.C. 20515

Dear Congressman Brown:

Further to the telephone call of May 14, 1976, from the Pension Benefit Guaranty Corporation (the "PBGC"), this is in response to the letter of April 14 cosigned by Senator Griffin, Senator Hart, and yourself concerning the decision of the PBGC that the termination of the Georgia-Pacific Portage Division Pension Plan (the "Plan") does not qualify the Plan for the PBGC's guarantee of basic benefits. The PBGC denied coverage to the Plan under §4082(b) of the Employee Retirement Income Security Act of 1974 (the "Act") based on its determination that the Plan terminated prior to July 1, 1974. Your letter asks for a review of this matter by myself and the other Directors of the PBGC.

As you know, the Act provides that guaranteed benefits are available under certain circumstances, even if a pension plan terminated prior to the date the Act was enacted, among which is the requirement that the Plan must have terminated "after June 30, 1974, and before the date of enactment of this Act . . . ." Therefore, the factual finding as to the date of termination is critical. The termination of a pension plan is sometimes more a process than a single happening, and encompasses a number of events which may, and frequently do, take place at different times. Thus, the PBGC's determination under §4082(b) is, in such cases, based on weighing the facts and circumstances of each particular case.

It is clear that the Act does not contemplate that accrual of benefits alone would determine coverage or lack of coverage. It is also clear that the PBGC was authorized to apply criteria which would take into account all pertinent circumstances in determining coverage. Where, as in this case, it is necessary to resort to the Act's "other reasonable basis" test, the PBGC has identified several other factors which may be used to determine when a plan terminated. These factors may include: the date of termination set by the Plan Administrator; the number of participants for whom benefits continued to accrue, and the length of time over which those benefits accrued; the date work terminated for the participants; and the date employer contributions ceased.

PBGC has not received any information from Georgia-Pacific which indicates that any plan terminated after June 30, 1974, or; more specifically between June 30 and September 2. The Georgia-Pacific Portage Division Plant ceased operations prior to July 1, 1974, resulting in the termination of all production. The only activity at the plant after June 30, 1974, was three days of maintenance work by two employees during the first week of July. No contributions were made, after June 30, 1974, for production work performed after that date. On these facts the PBGC determined that the weight of evidence did not indicate a termination after June 30. Your letter suggests that the PBGC required not only that a plan must be functioning, but that it have "substantial participation." The number of participants working and for whom benefits accrued was only one of the criteria applied by the PBGC.

My colleagues on the Board and I are satisfied that the PBGC utilized criteria which constitutes a reasonable basis and that the determination is supported by the evidence made available to the PBGC. We do not believe that in

matters of this nature it would be appropriate for the Board of Directors to become more involved in reviewing the day-to-day operational judgments of the officers and staff of the PBGC than to so satisfy ourselves. To do more would require similar involvement in many such cases which would soon tax the directors to an unacceptable extent, in view of our other duties as Cabinet officials.

Nonetheless, we have requested the PBGC to determine whether additional evidence exists bearing on the issue of the date the Plan terminated. On May 14, 1976, the PBGC informed your office that the Corporation had begun a review of this matter. You will be informed by the PBGC of the results of its further investigation.

Sincerely yours,

W.J. Usery, Jr.
Chairman
Board of Directors

Pension Benefit Guaranty Corporation
2020 K Street, N.W., Washington, D.C. 20006

Oct 21 1976

Honorable Garry Brown
House of Representatives
Washington, D.C. 20515

Dear Congressman Brown:

This is a follow-up to Chairman Usery's June 16, 1976 letter notifying you that the Pension Benefit Guaranty Corporation (the "PBGC") had been requested to determine whether additional evidence exists bearing on the issue when the Georgia-Pacific Portage Division Plan ("the Plan") terminated.

In June I directed the General Counsel to review fully the matter and to conduct an investigation as to whether additional relevant information could be made available promptly through informal requests. In that regard the PBGC requested both the Georgia-Pacific Corporation and the United Paperworkers International Union, AFL-CIO, to answer a number of questions and to submit documents required to complete our review. The Georgia-Pacific Corporation responded with answers and documents.

On the basis of all the information, the PBGC reluctantly must affirm its determination that the Plan termination is not covered.

The PBGC frequently must determine the date of termination for plans and, in this case the facts concerned with termination will not support a determination that the Plan, if it is a separate plan, terminated after June 30, 1974.

If the Plan is not a separate plan, but is a part of the Georgia-Pacific Retirement Plan the Plan has still not ter-

minated. It is not uncommon to have a single plan with varying eligibility and benefit provisions applicable to different locations or classes of employees.

We hope that our further inquiry has answered your questions.

Sincerely,

Kenneth L. Houck
Executive Director

cc: John W. Hill, Esq.
Miller, Anderson, Nash, Yeoke & Weiner
900 S.W. Fifth Avenue
Portland, Oregon 97204

Ms. Elaine B. Coppock, Secretary
Georgia-Pacific Pension Restoration Committee
324 E. Van Hoesen Boulevard
Kalamazoo, Michigan 49002

bcc: Mr. Alfred G. Albert
Deputy Solicitor
Department of Labor
Room S2002
2nd & Constitution Avenue, N.W.
Washington, D.C. 20210

Mr. Wolf Haber
Assistant General Counsel
Department of the Treasurer
Room 1410
15th & Pennsylvania Avenue, N.W.
Washington, D.C. 20220

Mr. James Ravlin
Office of the General Counsel
Department of Commerce
Room 5870
14th & Constitution Avenue, N.W.
Washington, D.C. 20230

CGC: COCook: ey:99/27/ /6:revised 10/ /76

Concur: OGC OED

Rose Houck

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1079 September Term, 1984
Civil Action No. 79-01248

Priscilla Belland, et al.,
Appellants

v.

Pension Benefit Guaranty Corporation
a Federal body, et al.

Appeal from the United States District Court for the District of Columbia.

Before: TAMM, WALD, and STARR, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgments _____ of the District Court appealed from in this cause are herby affirmed, in accordance with the opinion of the Court filed herein this date.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

Date: February 3, 1984
Opinion for the Court filed by Circuit Judge Tamm.
Opinion dissenting in part filed by Circuit Judge Wald.

A true copy:
Test: George A. Fisher
United States Court of Appeals
for the District of Columbia Circuit

By: /s/ _____ Deputy Clerk

Filed FEB 3 1984
GEORGE A. FISHER
Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRISCILLA BELLAND, et al.	:	
	:	
Plaintiffs	:	
	:	
v.	:	Civil Action
	:	No. 79-1248
PENSION BENEFIT GUARANTY CORPORATION, et al.	:	
	:	
	:	
Defendants	:	

ORDER

Upon consideration of the motion of plaintiffs for summary judgment against Pension Benefit Guaranty Corporation, the cross-motion of Pension Benefit Guaranty Corporation for summary judgment against plaintiffs, the memoranda of points and authorities, the memoranda supporting the motion of plaintiffs submitted by co-defendants Geaorgia-Pacific Corporation and Brown Company, the arguments of counsel, and the entire record, it is this 30th day of June, 1981,

ORDERED that plaintiffs' motion for summary judgment be, and hereby is, denied; and it is further

ORDERED that the cross-motion of defendant Pension Benefit Guaranty Corporation for summary judgment be, and hereby is, granted.

FILED
JUN 30 1981
JAMES F. DAVEY, Clerk

RECEIVED: Jul 9 1981

/s/ Norma Holloway Johnson
NORMA HOLLOWAY JOHNSON
UNITED STAES DISTRICT JUDGE

29 U.S.C. §1461. Effective date; special rules

(a) The provisions of this subchapter will take effect on September 2, 1974.

(b) Notwithstanding the provisions of subsection (a) of this section, the corporation shall pay benefits guaranteed under this subchapter with respect to any plan –

1. which is not a multiemployer plan,

2. which terminates after June 30, 1974, and before September 2, 1974,

3. to which section 121 of this title would apply if that section were effective beginning on July 1, 1974, and

4. with respect to which a notice is filed with the Secretary of Labor and received by him not later than 10 days after September 2, 1974, except that, for reasonable cause shown, such notice may be filed with the Secretary of Labor and received by him not later than October 31, 1974, stating that the plan is a plan described in paragraphs (1), (2), and (3).

The corporation shall not pay benefits guaranteed under this subchapter with respect to a plan described in the preceding sentence unless the corporation finds substantial evidence that the plan was terminated for a reasonable business purpose and not for the purpose of obtaining the payment of benefits by the corporation under this subchapter for the purpose of avoiding the liability which might be imposed under subtitle D of this subchapter do not apply in the case of such a plan which terminates before September 2, 1974. For purposes of determining whether a plan is a plan described in paragraph (2), the provisions of section 1348 of this title shall not apply, but the corporation shall make the determination on the basis of the date on which benefits ceased to accrue or on any other reasonable basis consistent with the purposes of this subsection.